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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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UNITED STATES OF AMERICA,  
  
Plaintiff,

v.

WAYNE LEROY BURR,  
  
Defendant.

**MEMORANDUM DECISION  
AND ORDER DISMISSING  
MOTION TO REDUCE SENTENCE**

Case No. 2:14-CR-00154-DN-1

District Judge David Nuffer

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Defendant Wayne Leroy Burr seeks a reduction of his sentence pursuant to [18 U.S.C. § 3582\(c\)\(2\)](#) based on Amendment 782 to the United States Sentencing Guidelines,<sup>1</sup> which “provides a retroactive two-offense-level reduction for certain drug offenses.”<sup>2</sup>

Because Mr. Burr’s sentence was not based on a guideline range which was *subsequently* lowered by Amendment 782, Mr. Burr’s is ineligible for relief under [§ 3582\(c\)\(2\)](#), and his Motion<sup>3</sup> is DISMISSED for lack of jurisdiction.

**DISCUSSION**

“Generally, federal courts lack jurisdiction to modify a term of imprisonment once it has been imposed.”<sup>4</sup> “Nevertheless, a district court may modify a sentence if there is statutory authorization to do so.”<sup>5</sup> Such authorization is found at [18 U.S.C. § 3582\(c\)\(2\)](#).

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<sup>1</sup> [18 U.S.C. § 3582\(c\)\(2\)](#) – Motion for Reduction of Sentence. Amendment 782 (“Motion”), [docket no. 599](#), filed June 30, 2017.

<sup>2</sup> *United States v. Wilson*, 638 Fed. App’x 722, 723 (10th Cir. 2016).

<sup>3</sup> [Docket no. 599](#), filed June 30, 2017.

<sup>4</sup> *United States v. Larsen*, 664 Fed. App’x 751, 752 (10th Cir. 2016) (citing *Dillon v. United States*, 560 U.S. 817, 819 (2010)).

<sup>5</sup> *Id.* (citing *United States v. Graham*, 704 F.3d 1275, 1277 (10th Cir. 2013)).

“Section 3582(c)(2) allows courts to consider certain factors and reduce a sentence that was based on a sentencing range that subsequently has been lowered by the Sentencing Commission if doing so is consistent with the Sentencing Commission’s policy statements.”<sup>6</sup>

To obtain a sentence reduction under § 3582(c)(2), “a defendant must overcome three *distinct* hurdles[.]”<sup>7</sup> “*First*, under the statute’s ‘based on’ clause, the defendant must show he was sentenced based on a guideline range the Sentencing Commission lowered subsequent to defendant’s sentencing.”<sup>8</sup> “If not, the district court lacks jurisdiction over the defendant’s motion and the motion must be dismissed.”<sup>9</sup> “*Second*, under § 3582(c)(2)’s ‘consistent with’ clause, the defendant must establish his request for a sentence reduction is consistent with the Commission’s policy statements related to § 3582(c)(2).”<sup>10</sup> “Those statements and accompanying commentary appear at U.S.S.G. § 1B1.10.”<sup>11</sup> “*Third*, the defendant must convince the district court he is entitled to relief in light of the applicable sentencing factors found in 18 U.S.C. § 3553(a).”<sup>12</sup>

Mr. Burr’s Motion fails to overcome the first hurdle for obtaining a reduction of his sentence under § 3582(c)(2). Mr. Burr argues he is entitled to a reduction of his sentence under § 3582(c)(2) based on the Sentencing Commission’s Amendment 782.<sup>13</sup> Amendment 782 “modified U.S.S.G § 2D1.1(c)’s Drug Quantity table” by reducing “the base offense levels for many federal drug trafficking crimes by two levels.”<sup>14</sup> Amendment 782 became effective on

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<sup>6</sup> *Id.* (citing 18 U.S.C. § 3582(c)(2)).

<sup>7</sup> *United States v. C.D.*, 848 F.3d 1286, 1289 (10th Cir. 2017) (emphasis in original).

<sup>8</sup> *Id.* (emphasis in original).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (emphasis in original).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1289-90 (emphasis in original).

<sup>13</sup> Motion at 5-6.

<sup>14</sup> *United States v. Castillo-Arment*, 658 Fed. App’x 931, 932 (10th Cir. 2016).

November 1, 2014, and was made retroactive by the Sentencing Commission's Amendment 788.<sup>15</sup>

Mr. Burr pleaded guilty to one count of conspiracy to distribute heroin, a violation of [21 U.S.C. § 841\(a\)\(1\)](#), and one count of money laundering, a violation of [18 U.S.C. § 1957](#).<sup>16</sup> He was sentenced on June 29, 2016,<sup>17</sup> *after* the effective date of Amendment 782.<sup>18</sup> Mr. Burr's presentence report identified his guideline range of imprisonment as 151 months to 188 months based on a total offense level of 32 and a criminal history category of III.<sup>19</sup> And used the 2015 Sentencing Guidelines Manual, incorporating all guideline amendments—including Amendment 782—to determine his offense level.<sup>20</sup> Therefore, because Amendment 782 was used to determine Mr. Burr's guideline range, his guideline range was not *subsequently* lowered by Amendment 782.

Additionally, Mr. Burr was sentenced to a stipulated 96-month term of imprisonment.<sup>21</sup> Mr. Burr's Plea Agreement expressly provides that "[p]ursuant to [Rule 11\(c\)\(1\)\(C\) of the Federal Rules of Criminal Procedure](#), the sentence imposed by the Court will be 96 months imprisonment, which I agree is a reasonable sentence."<sup>22</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> Judgment in a Criminal Case ("Judgment") at 1, [docket no. 546](#), filed July 6, 2016; Statement by Defendant in Advance of Plea of Guilty and Plea Agreement Pursuant to [Fed. R. Crim. P. 11\(c\)\(1\)\(C\)](#) ("Plea Agreement") at 1-2, [docket no. 510](#), filed Apr. 12, 2016; Minute entry for Proceedings Held Before Kenneth G. Gale, docket no. 509, filed Apr. 12, 2016.

<sup>17</sup> Minute Entry for Proceedings Held Before Judge David Nuffer, docket no. 544, filed June 29, 2016.

<sup>18</sup> [Castillo-Arment](#), 658 Fed. App'x at 932.

<sup>19</sup> Presentence Investigation Report ¶ 93, docket no. 538, filed June 13, 2016.

<sup>20</sup> *Id.* ¶¶ 39-50.

<sup>21</sup> Judgment at 2; Plea Agreement ¶ 12.b.

<sup>22</sup> Plea Agreement ¶ 12.b.

Under precedent established by Justice Sotomayor’s concurrence in *Freeman v. United States*<sup>23</sup> and the Tenth Circuit in *United States v. Graham*,<sup>24</sup> the “two situations in which a [R]ule 11(c)(1)(C) plea agreement is based on a [g]uidelines sentencing range [are]: (1) when the agreement calls for the defendant to be sentenced within a particular [g]uidelines sentencing range, or (2) when the plea agreement provides for a specific term of imprisonment but also makes clear that the basis for the specific term is a [g]uidelines sentencing range applicable to the offense to which the defendant pleaded guilty.”<sup>25</sup> “In the second situation, the sentencing range that forms the basis of the specified term should be evident from the agreement itself.”<sup>26</sup>

Mr. Burr’s sentence does not fall into either of these situations. Mr. Burr’s Plea Agreement does not call for him to be sentenced within a particular guideline sentencing range. It calls for a specific 96-month term of imprisonment.<sup>27</sup> The Plea Agreement also makes no reference to Mr. Burr’s guideline range being the basis for the 96-month term of imprisonment. The only reference to the sentencing guidelines in the Plea Agreement reads:

I know that the sentencing procedures in this case and the ultimate sentence will be determined pursuant to 18 U.S.C. § 3553(a), and that the Court must consider, but is not bound by, the United States Sentencing Guidelines, in determining my sentence. I have discussed these procedures with my attorney. I also know that the final calculation of my sentence by the Court may differ from any calculation the United States, my attorney, or I may have made, and I will not be able to withdraw my plea if this occurs. However, because my plea of guilty is being entered pursuant to Rule 11(c)(1)(C), as explained below, I know that I will be able to withdraw my plea if the Court does not accept the terms of this agreement.<sup>28</sup>

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<sup>23</sup> 564 U.S. 522, 534-43 (2011) (plurality opinion).

<sup>24</sup> 704 F.3d 1275 (10th Cir. 2013).

<sup>25</sup> *United States v. Jones*, 634 Fed. App’x 649, 650 (10th Cir. 2015) (internal quotations and punctuation omitted).

<sup>26</sup> *Id.* at 650-51 (internal quotations omitted).

<sup>27</sup> Plea Agreement ¶ 12.b.

<sup>28</sup> *Id.* ¶ 3.

Therefore, Mr. Burr's sentence was based on his agreement with the government, not a guideline sentencing range.

Because Mr. Burr's sentence was not based on a guideline range which Amendment 782 subsequently lowered, Mr. Burr is ineligible for a sentencing reduction under [§ 3582\(c\)\(2\)](#).<sup>29</sup>

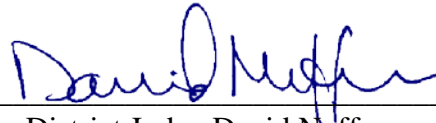
Therefore, jurisdiction over Mr. Burr's Motion is lacking.<sup>30</sup>

**ORDER**

IT IS HEREBY ORDERED that Mr. Burr's Motion<sup>31</sup> is DISMISSED for lack of jurisdiction.

Signed August 29, 2017.

BY THE COURT

A handwritten signature in blue ink, appearing to read "David Nuffer", is written over a horizontal line.

District Judge David Nuffer

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<sup>29</sup> [Munoz](#), 682 Fed. App'x at 636.

<sup>30</sup> [C.D.](#), 848 F.3d at 1289.

<sup>31</sup> [Docket no. 599](#), filed June 30, 2017.